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IN THE

Supreme Court of the United States

October Term 1956

No. 597

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a labor organization; ROBERT LENAGHEN, LORA DENKERS, MEL SIMPSON, *Appellants*

v.

J. J. NEWBERRY COMPANY, a corporation, *Appellee*

On Appeal From the Supreme Court of the State of Idaho

JURISDICTIONAL STATEMENT

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v.

J. J. NEWBERRY COMPANY, a corporation, *Appellee*

On Appeal From the Supreme Court of the State of Idaho

JURISDICTIONAL STATEMENT

Appellants appeal from the order of the Supreme Court of Idaho entered on July 2, 1956, denying appellants' petition for rehearing (R. 11-16), and from the judgment of the Supreme Court of Idaho entered on June 6, 1956 (R. 12), affirming the decree of the District Court of the Fifth Judicial District of the State of Idaho (R. 477), which permanently enjoined appellants from picketing appellee's place of business. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho affirming the decree of the District Court, — P. 2d —, 38 LRRM 2258 is reported at — Idaho —. A copy of this opinion is attached hereto as Appendix A. The Supreme Court of Idaho did not render an opinion in denying appellants' petition for rehearing. The opinion of the Idaho District Court is set forth in the Record at P. 442 and is attached hereto as Appendix B.

JURISDICTION

This action was brought by appellee Newberry Company to enjoin peaceful picketing carried on by appellants in front of the Newberry Store in Pocatello, Idaho. Both the District Court and the Idaho Supreme Court held that the matter was within the jurisdiction of the state court and that Section 44-712, Idaho Code, which defined a labor dispute far more restrictively than federal statutes, was applicable to the dispute rather than federal law. Accordingly, a permanent injunction was issued enjoining the picketing.

The judgment of the Supreme Court of Idaho was entered on June 6, 1956 (R. 12), and its order denying appellants' petition for rehearing was entered on July 2, 1956 (R. 16). Notice of Appeal to this Court was filed in the Supreme Court of the State of Idaho on September 29, 1956 (R. 17).

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, U.S.C., Sec. 1257 (2). The following cases are believed to sustain the jurisdiction of this Court to review the judgment in this case by appeal; *United Automobile*

Workers v. *Wisconsin E.R.B.*, 351 U.S. 266; *United Automobile Workers* v. *O'Brien*, 339 U.S. 454; *La-Crosse Telephone Corp.* v. *Wisconsin E.R.B.*, 336 U.S. 18; *Bethlehem Steel Co.* v. *New York S.L.R.B.*, 330 U.S. 767; *Thomas* v. *Collins*, 323 U.S. 516.

STATUTE INVOLVED

The state statute whose validity is involved in this case is:

Sec. 44-712, Idaho Code:

"The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

QUESTIONS PRESENTED

1. Whether the Supreme Court of Idaho has disregarded and nullified in the State of Idaho the decisions of the United States Supreme Court holding that in kindred or like circumstances a state court was without jurisdiction to enjoin peaceful picketing.

2. Whether Section 44-712, Idaho Code, as applied in this case, is unconstitutional

(a) as in conflict with the National Labor Relations Act, as amended, or as invading the field which Congress has occupied by the enactment of that statute; or

(b) as in violation of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the Supreme Court of Idaho erred in failing to hold that peaceful picketing to induce an

employer to enter into a contract presented a question of unfair labor practices within the exclusive jurisdiction of the National Labor Relations Board.

4. Whether the Supreme Court of Idaho erred in holding as a matter of law in Idaho that peaceful picketing and advertising to divert Appellee's patronage to unionized stores was interference with Newberry's freedom to contract.

STATEMENT OF THE CASE

The relationship between the parties began in 1952 when appellants, hereinafter referred to as the Union, filed a petition with the National Labor Relations Board seeking certification as the collective bargaining agent for employees of appellee, hereinafter referred to as Newberry. The Board assumed jurisdiction and directed an election for August 13, 1952, but immediately prior to the election, the Union withdrew its petition and the election was never held (R. 442). On August 13, 1952, the Union filed charges against Newberry before the National Labor Relations Board alleging that Newberry had committed unfair labor practices in violation of Sec. 8 (a) (1) and (5) of the National Labor Relations Act, 29 U.S.C., Sec. 158 (a) (1), (5) (R. 442).

A complaint was issued by the NLRB and a hearing was duly held before a trial examiner in Pocatello January 13, 1953. The examiner found on all issues in favor of Newberry and recommended that the complaint be dismissed (R. 420). The Board approved the findings and recommendations of the trial examiner and dismissed the complaint on March 25, 1953 (R. 420).

Thereafter, the Union began picketing Newberry, with a single picket peacefully patrolling the store front, carrying a sign which read (R. 411):

> "Members & Friends
> of Organized Labor
> We Need Your Help
> Please Shop at the Stores
> That Display This Sign
> (facsimile of Union store card or emblem)
> Our Members
> Do Not Patronize
> Newberry's
> Retail Clerks Union
> Local # 560"

At the same time Newberry was placed on the Union's unfair list (Appendix A, infra, p. 3a).

The picketing continued to and including April 8, 1953 when Newberry filed a complaint in the Idaho District Court seeking order restraining the picketing (R. 367). A show cause order was entered directing the Union to show cause why an injunction pendente lite should not be granted, and further enjoining the picketing pending the hearing (R. 373). The complaint as originally filed set forth in its paragraph V the following (R. 369):

> "* * * and for the purpose of intimidating, coercing and compelling the plaintiff to enter into an unlawful agreement with the defendant union to require its employees to join the said defendant union, did on March 31, 1953, place and post pickets immediately in front of the entrance to the premises of the plaintiff. The sole purpose of the defendant * * * is to intimidate, coerce and compel the plaintiff's employees to join and become members of the defendant union and to intimidate, coerce and compel the plaintiff to enter

> into an agreement with the defendant union whereby all of the employees of the plaintiff would be compelled to join the defendant union and to remain members thereof as a condition of employment, all of which is contrary to the laws and public policy of the State of Idaho."

At the beginning of the hearing on the show cause order, Newberry moved to amend its complaint by deleting certain portions concerning allegations that the purpose of the picketing was to require the employees of Newberry to join the Union and intimidating and coercing Newberry's employees to join and compelling them to remain members as a condition of employment (R. 412). The amended complaint, in the portions heretofore set forth as relevant, then read (R. 411-412):

> "And for the purpose of intimidating, coercing and compelling the said plaintiff to enter into an unlawful agreement with the defendant union did, on March 31, 1953, place and post pickets * * * The sole purpose of the defendants in picketing the plaintiff's place of business is to intimidate, coerce and compel the plaintiff to enter into an agreement with the defendant union all of which is contrary to the laws and public policy of the State of Idaho."

At the hearing on the show cause order, the Union argued that the state court was without jurisdiction for the reason that the matter complained of had been preempted by the Labor Management Relations Act of 1947, 29 U.S.C. Sec. 151 et seq. (R. 412). On August 31, 1953, the District Court enjoined the picketing pendente lite (R. 424), an amended answer was filed to the amended complaint, and on issues joined, trial

was held in April 1954. The crucial finding of fact was as follows (R. 472):

> "IX. That the purpose of placing said picket by the defendant union was unlawfully to intimidate, coerce and compel plaintiff to enter into an agreement with defendant union, and by the use of economic coercion by defendants, to destroy plaintiff's freedom of contracting."

This finding was upheld by the Idaho Supreme Court (Appendix A, infra, p. 9a).

The fact that Newberry was engaged in commerce was settled early in the controversy and never questioned by any of the parties or the courts involved. In the opinion of the District Court in its memorandum decision on the Order to Show Cause, the Court set forth the following (R. 414):

> "The plaintiff is engaged in the retail mercantile business operating some 480 'chain' stores located in all but a few of the states. The store involved is located in Pocatello. Substantially all—at least ninety per cent—of the merchandise offered for sale in that store comes to it from without the State of Idaho. From these facts the parties agree that regulation by Congress under the commerce clause is warranted and that the first of the two prerequisites to jurisdiction is present." (The latter reference was to prerequisites for federal jurisdiction.)

Supplementing this precise statement of the Idaho District Court was the fact that the National Labor Relations Board had already exerted its jurisdiction earlier in the controversy between Newberry and the Union (R. 386). The Idaho Supreme Court never questioned that the dispute affected commerce.

Likewise, the federal question was presented at the first stages of the controversy in the Idaho District Court and repeatedly urged throughout the state proceedings. On demurrer to the original complaint, the defendant Union challenged the jurisdiction of the state court, arguing that the matter had been preempted by Congress by its enactment of the National Labor Relations Act (R. 408). This argument was of principal concern both to the District Court and the Supreme Court of Idaho, where it was nonetheless consistently rejected.

The Idaho Supreme Court affirmed the District Court's decision on all counts. Concerning the matter of federal preemption, the Court, after a detailed statement of the facts and the proceedings below, set forth in full Sec. 2 (9) of the National Labor Relations Act as amended, 29 U.S.C. Sec. 152 (9), which defined a labor dispute as follows (Appendix A, infra, p. 7a):

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputes stand in the proximate relation of employer and employee."

Then the Idaho Supreme Court set forth that the activities of the Union were not specified in the above statutory provision and did not come within the congressional enactments covering labor practices or labor disputes affecting interstate commerce (Appendix A, infra, p. 7b). Then (Appendix A, infra, p. 7a):

> "The activities and conduct of the Union here complained of have neither been approved nor prohibited by the National Labor Relations Act, and are not within the categories covered therein. Hence the Union cannot successfully attack the jurisdiction of state courts on the ground that Newberry failed to exhaust administrative or judicial remedies available under the Labor Management Relations Act, or that the activities complained of have been preempted or covered in the anti-injunction act, 47 U.S. Stat. at Large, 70, 29 U.S.C.A. Sec. 101 to 115, or the National Labor Relations Act, 29 U.S.C.A. Sec. 151 to 168, inclusive."

The contention that the Union's activities were protected as a proper exercise of freedom of speech permitted by the First and Fourteenth Amendments to the United States Constitution was also raised at the first stage of the proceeding in the Idaho District Court (R. 408) and repeatedly urged thereafter, but was denied at all stages of the proceeding. The Idaho Supreme Court dealt with the contention in this fashion (Appendix A, infra, 9a):

> "The trial court correctly found that the picketing was for an unlawful purpose, i.e., for the purpose of unlawfully intimidating and coercing Newberry to enter into an agreement with the Union and to destroy Newberry's freedom of contracting. The constitutional provisions above cited do not prevent or prohibit the affording of appropriate remedies for the abuse of the constitutional guarantees."

The Union petitioned for rehearing thereafter, which was denied on July 2, 1956 (R. 16). Notice of Appeal was filed September 29, 1956 (R. 17).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

(a) The Evasion by the State Court of the Federal Preemption Doctrine

Notwithstanding the fact that the question of exclusive jurisdiction of the National Labor Relations Board was repeatedly urged upon the Idaho courts from the very beginning of this action, the Idaho courts erected artificial contrivances to evade the federal supremacy. The original complaint, as set forth above, alleged that the purpose of the picketing was to intimidate and coerce Newberry to enter into an unlawful agreement with the Union "to require its employees to join the said defendant union." It further alleged that the sole purpose of the defendant Union was to intimidate, coerce and compel Newberry's employees to join and become members of the defendant Union.

At the commencement of the hearing on the Order to Show Cause, Newberry moved to amend its complaint to delete references to the coercion of Newberry's employees (R. 412), thus attempting to confine the issue merely to coercion upon Newberry to enter into an "unlawful agreement" (R. 411-412). Plaintiff's counsel, in moving orally to amend the complaint in the District Court, stated that the deletions were "non-essential" in the cause (R.), that the deleted passages were "immaterial" and "unnecessary" (R.). The pleadings in this posture remained before the Idaho courts throughout. The trial court and the Idaho Supreme Court both found that the picketing was for the purpose of "intimidating and coercing Newberry to enter into an agreement with the Union" (Appendix A, infra, p. 9a).

The so called unlawful agreement, of course, was a collective bargaining agreement which would have covered the employees of Newberry.

Nonetheless, the Idaho Supreme Court chose to isolate the activities of the Union and remove them from the areas of conduct which are either prohibited or protected by the federal Act, and found they were not covered in any way by the National Labor Relations Act. The Court's chain of reasoning was set up in this fashion:

It first stated that the National Labor Relations Act was specifically limited in coverage to labor disputes which affected commerce. Then it set forth in full the federal statutory definition of labor dispute, and conveniently stated, without analysis of the language of Sec. 2 (9) of the Act, 29 U.S.C. Sec. 152 (9), that the activities of the Union were not specified in that provision and did not come within the purview of the law. This was done despite the language of Sec. 2 (9) which is so clearly applicable to the conduct of the Union, as follows:

> "The term 'labor dispute' includes any controversy concerning . . . the representation of persons in . . . seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Thus followed the Idaho Supreme Court's conclusion: "The activities and conduct of the Union here complained of have neither been approved nor prohibited by the National Labor Relations Act, and are not within the categories covered therein" (Appendix A, infra, p. 7a). This permitted the Idaho Court

to apply its own statute on definition of a labor dispute, Idaho Code, Sec. 44-712, which contains a far more restrictive definition of the term than the federal law, and under the state law find no labor dispute and thus freedom to issue the injunction.[1]

It is respectfully submitted that the Idaho courts openly and summarily flouted the federal preemption doctrines repeatedly established by the Supreme Court of the United States.[2] Attorneys for the Union argued

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[1] Appellant believes the Idaho Supreme Court misunderstood the federal supremacy argument (Appendix A, infra, p. 8a). As an example, the court stated in reference to this argument, "Further, the Union had already had a hearing before the National Labor Relations Board and on issues presented, the Board determined the controversy favorable to Newberry." The court obviously referred to a previous hearing before the National Labor Relations Board growing out of charges of a refusal to bargain brought against the company by the Union (Appendix A, infra, p. 1a). This hearing in no way dealt with, encompassed, or referred in any manner to the issues before the Idaho Supreme Court, particularly since no picketing had commenced. The employer's alleged misconduct in refusing to bargain was the sole issue. Indeed, at no time were the matters alleged by the employer in its complaints in the state court brought to the attention of the Labor Board although they were clearly within the Board's jurisdiction inasmuch as they charged unfair labor practices on the part of the Union. The employer sought its injunctional remedy from the state court. The Idaho Supreme Court failed to differentiate between charges of unfair labor practices which may be brought against an employer, and those which may be brought against a union. One does not embrace the other. Plainly the Board was never given an opportunity to consider the unfair labor practices alleged in the complaints filed in the state court.

[2] At another place in its opinion, the Idaho Supreme Court embraced a doctrine already specifically repudiated by this Court, wherein it stated: "Further, if the Congressional enactments covering labor disputes were applicable, such remedies would have been futile. Before the machinery could have been put in opera-

Weber v. *Anheuser-Busch, Inc.*, 348 U.S. 468, before the Idaho Supreme Court in their brief in oral argument, and in their petition for rehearing, as well as numerous other recent rulings of this Court on the lines to be drawn between federal and state authority. But the Idaho Supreme Court ignored this stricture from *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468:

> "But where the moving party itself alleges unfair labor practices where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the State Court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

The complaint, by alleging a purpose of the Union to coerce Newberry into entering into a contract with the Union, whether the so called "non-essential" allegations of coercing the employees to join the Union were left in or not, raised an issue of whether the Union was in violation of Sec. 8 (b) (1) (A) or Sec. 8 (b) (2) of the National Labor Relations Act. The findings of fact by the District Court, which were approved by the Idaho Supreme Court, supported the allegations of the complaint that the purpose of the Union was to coerce Newberry into contracting with the Union. The state courts should have declined jurisdiction from the outset.

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tion the wrong complained of and prohibited by the injunction would have been accomplished." (Appendix A, infra, p. 8a).

The futility of federal remedy argument was rejected by this Court in *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933.

A further unfortunate example of the Idaho Court's unwillingness to follow the prevailing federal preemption doctrines is illustrated by *Pocatello Building & Construction Trades Council* v. *C. H. Elle Construction Co.*, No. 372, 1956 Term, where this Court reversed the Idaho Supreme Court in a per curiam ruling on Monday, November 5, 1956.[3] In that case, like this one, the allegations of the complaint and the facts of the case clearly established federal jurisdiction, but the Idaho court ignored this doctrine with hardly any comment (Jurisdictional Statement of Appellants, Appendix A, page 27, *Pocatello Building & Construction Trades Council* v. *C. H. Elle Construction Co.*, No. 372, 1956 Term.)

But here the Idaho Supreme Court has at least attempted to justify its ruling by its statement that the activities of the Union were never prohibited or protected under the National Labor Relations Act. A similar attempt to evade the federal preemption doctrine was answered decisively by this Court in *Teamsters Local* v. *New York, N.H.&H. R.R. Co.*, — U.S. —, 76 S. Ct. 227, where Mr. Justice Minton, for a unanimous court, said:

> "Respondent contends, however, that even if railroads may seek the aid of the N.L.R.B., it was not required to do so in this case because petitioners' conduct was neither protected by paragraph 7 nor prohibited by paragraph 8 (b) (4) of

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[3] In the opinion below, the Idaho Supreme Court cited this ruling, *Elle* v. *Pocatello Building & Construction Trades Council*, and *Simplot* v. *Pocatello Bldg. & Constr. Trades Council*, 297 P. 2d 519, as additional authority for its position taken in this case, and further relied on the same line of cases in this proceeding that were relied on to establish state jurisdiction in the *Elle* decision (Appendix A, infra, pp. 8a, 9a).

> the Labor Management Relations Act. As we noted earlier, respondent's amended complaint alleged violation of the Act. Whether the Act was violated or whether, as respondent now claims, it was not, is of course, a question for the Board to determine. Even if petitioners' conduct is not prohibited by paragraph 8 of the Act, it may come within the protection of paragraph 7, in which event the State was not free to enjoin the conduct. In any event the Board's jurisdiction in the circumstances of this case is clearly settled by this court's recent decision in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481."

The attempt of the Idaho Supreme Court to evade the federal supremacy doctrine is thus without foundation on every count. The allegations of the complaint and the facts of this case bring it squarely within the holding of the *Weber* case and it was error for the Idaho Court to decline to follow this Court's clear doctrines.

(b) That the Allegations of the Complaint Establish Federal Jurisdiction Is Supported by Consistent Authority

The facts in *Garner* v. *Teamsters Union*, 346 U.S. 485, are similar enough to those in the instant case to have persuaded the Idaho court it lacked jurisdiction. In *Garner*, the union was picketing the employer seeking to organize his employees. The union there did not represent a majority of Garner's employees just as the Union here did not represent the Newberry employees. In the instant case, the Union was picketing to compel Newberry to enter into a contract, according to the Idaho Supreme Court, which of necessity would have entailed organization of the Newberry employees into the Union. The words of the late Mr.

Justice Jackson in *Garner* are just as applicable to this case as if they were written for it:

> "Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioner presented it to that body. The power and duty of primary decision lies with the Board, not with us." 346 U.S. 485, .

In *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933, the unions involved were peacefully picketing the employer's construction project for the purpose of requiring the employer to cause his employers to join the union, according to the Alabama Supreme Court, 258 Ala. 500. A state injunction was issued, holding that the union conduct was violative of Sec. 8 (b) (1) (A) of the National Labor Relations Act, and this Court reversed per curiam.

Other state courts have had little difficulty in finding that union conduct similar to that involved herein falls within the exclusive jurisdiction of the National Labor Relations Board. The Supreme Court of Kansas rejected the identical theory advanced by the Idaho Court herein in *City Motors, Inc.*, v. *Machinists Lodge* 778, — Kan. — (1956), 292 P. 2d 1102, when it stated:

> "The essence of the first contention advanced by appellant as a ground for reversal of the trial court's judgment is that stranger picketing by a union, which has not been selected as the bargain-

> ing agent for employees, is not within the intent or purview of the Labor Management Relations Act of 1947, hence the state court, not the National Labor Relations Board, has jurisdiction over activities such as are here involved. In view of recent decisions this contention lacks merit and requires little comment. All that need be said with respect thereto is that this court, . . . as well as others, see e.g. Garner v. Teamsters, 346 U.S. 485, have held to the contrary."

The Supreme Court of Washington took the same position in *Stoddard-Wendle Motor Co.* v. *Machinists Lodge 942,* — Wash. — (1956), 295 P. 2d 305, in a case where the union did not represent any employees of the employer, was peacefully picketing the premises, and had placed the employer on the unfair list. This union conduct was identical to that of petitioner herein. The Washington court said:

> "In spite of the analysis and conjectures which have been made, and the criticisms which have been directed to the language of the Garner opinion, we conclude that the United States Supreme Court has announced the following rule:
>
> "A state court does not have jurisdiction to enjoin peaceful picketing to induce unionization of the employees of an interstate employer, since such activity presents the question of an unfair labor practice within the meaning of the terms of the Labor Management Relations Act, which initially at least, gives the National Labor Relations Board exclusive jurisdiction."

See also *Busch & Sons, Inc.* v. *Retail Union,* — N.J. —, 104 A. 2d 488; *Gulf Shipside Storage Corp.* v. *Moore,* — La. —, 71 So. 2d 236; *Dyer* v. *IBT,* — Cal. App. —, 269 P. 2d 199; *Grimes & Hauer, Inc.* v. *Pol-*

lock, 163 Ohio St. 372, 127 N.E. 2d 203; *Cooper Transport Co.* v. *Stufflebean,* — Mo. —, 280 S.W. 2d 832.

Thus the Idaho Supreme Court has held contrary to every recent leading judicial authority on similar questions. Its decision is especially in conflict with the rulings of the highest state courts of Kansas, Washington, New Jersey, Louisiana, Ohio, and Missouri, as set forth by the cases above listed. There is no other highest state court decision on similar facts supporting the Idaho ruling since this Court's decision in *Garner* v. *Teamsters, supra.* With all due deference, the Idaho Supreme Court has simply refused to accept the settled rulings on questions of this kind, and only a reversal of its ruling by this Court will cause it to conform to the law of the land.

(c) The Idaho Court's Holding That Peaceful Picketing and Advertising to Divert Newberry's Patronage Was an Interference With Newberry's Freedom to Contract is a Serious Limitation on the Union's Right of Free Speech

The freedom of speech question that is often present in picketing cases is of particular importance here. The Idaho Supreme Court held that the Union's peaceful picketing of Newberry's premises was for an unlawful purpose, i.e., to interfere with Newberry's freedom to contract. Yet, the District Court specifically found, and such finding was approved by the Idaho Supreme Court (Appendix A, infra, p. 9a), in its finding numbered "VII," as follows: "That at no time did the defendant union, or any of its representatives or agents, present to or discuss with plaintiff, a contract or proposed agreement."

In this case, there was nothing more than one single picket peacefully patrolling in front of Newberry's

premises with a sign asking union members and the public to decline to patronize the store. There is not even a suggestion that there was anything more to the picketing in any way whatsoever. Yet the Idaho courts found that this purest kind of peaceful picketing-advertising was for an unlawful purpose because by the very nature of it, it would intimidate and coerce Newberry into making a contract with the Union, despite the fact as found by the Idaho courts, that no contract was ever presented, discussed, or proposed by the Union!

There can be no more clearly cut factual situation coming within the ruling of this Court in *American Federation of Labor* v. *Swing*, 312 U.S. 321, than this case presents. The words of this Court in *Swing* are particularly appropriate here, at 312 U.S. 321, 326:

> "We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> "Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of eco-

> nomic competition between employer and workers so small as to contain only an employer and those directly employed by him."

This Court's rulings in *Hughes* v. *Superior Court*, 339 U.S. 460; *Building Service Employes* v. *Gazzam*, 339 U.S. 532; *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470; *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, and others, are readily distinguishable on their facts from the instant matter. In all those cases, there was affirmative union conduct accompanying picketing sufficient to establish an unlawful purpose to restrain and coerce the employees or the parties being picketed. While the Idaho court found the purpose of picketing here unlawful, there are no facts to support a finding of an unlawful purpose other than the mere picketing by a union that did not represent the employer's employees urging members and friends of organized labor to shop at stores displaying the union store card, and not to patronize Newberry's. This is precisely within the *Swing* holding that "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employer and workers so small as to contain only an employer and those directly employed by him."[4]

Now, either *Swing* should be followed, or it should be overruled. It is submitted that the holding in *Swing* is still the basic law of the land, the facts of

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[4] In this connection, the Idaho statute, Sec. 44-712, defining a labor dispute as a controversy between an employer and a majority of his employees in a bargaining unit is in violation of the Fourteenth Amendment by restricting the area of picketing in direct contravention to the holding in *Swing, supra.*

this case are squarely within that holding, and Idaho ought to be compelled to follow it. The decision of the Idaho Supreme Court was a serious restriction on the Union's right of free speech.

WHEREFORE, for the reasons hereinabove set forth, the federal questions presented are substantial and this Court should assume jurisdiction and reverse the decision of the Idaho Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF IDAHO

No. 8339

J. J. NEWBERRY COMPANY, a corporation,
Plaintiff-Respondent,

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a Labor Organization; ROBERT LENAGHEN; LORA DENKERS; MEL SIMPSON, *Defendants-Appellants*

Rehearing Denied July 2, 1956.

KEETON, Justice.

J. J. Newberry Company, a corporation, respondent here, will hereinafter be referred to as Newberry. Retail Clerks International Association, Local No. 560, a Labor Organization, Robert Lenaghen, Lora Denkers and Mel Simpson, appellants, will hereinafter be referred to as the Union.

In 1952 the Union claimed a majority representation of the employees of Newberry's store in Pocatello, and filed a petition for an election with the National Labor Relations Board, pursuant to congressional enactments and procedure, to which election Newberry consented. The purpose of the election was to permit Newberry's employees to vote as to whether they desired the Union to act as their bargaining agent. The election was scheduled for August 13, 1952. August 12 some of the employees of Newberry informed Mr. Lenaghen, secretary and treasurer of the Union, that none of the employees of Newberry would attend the meeting and none would vote for the Union. The Union then withdrew its request for an election.

Thereafter on August 13, 1952, the Union filed charges against Newberry before the National Labor Relations Board claiming unfair labor practices. The charge alleged in substance that the Union on and after June 23, 1952,

represented a majority of Newberry's employees and that Newberry had refused to bargain with the Union and had dealt directly with the employees on the subject of wages and other conditions of employment without giving the Union's representatives an opportunity to be present; that Newberry had refused to recognize the Union as the exclusive representative or bargaining agent of Newberry's employees and had committed unfair labor practices in violation of Sec. 8 (a) (1) and (5) of the National Labor Relations Act, 61 Stat. 136, 29 U.S.C.A. 158 (a) (1, 5). Newberry denied the commission of the acts complained of.

Hearing on the charge and the Regional Director's complaint made pursuant thereto was held in Pocatello January 13, 1953. The trial examiner found on all issues in favor of Newberry, and specifically found that Newberry did not interfere with, restrain or coerce its employees within the meaning of the National Labor Relations Act, and recommended that the complaint be dismissed in its entirety. The National Labor Relations Board approved the findings and recommendation of the examiner and dismissed the proceedings March 25, 1953.

At a meeting of the Executive Council of the Union held in March, 1953, respondent Lenaghen was directed to place a picket in front of Newberry's store in Pocatello.

The Union then placed a picket to patrol the outside of the sidewalk at the entrance and in front of Newberry's store, carrying a sign which read:

"Members & Friends
of Organized Labor
We Need Your Help
Please Shop At the Stores
That Display This Sign
(facsimile of Union store card or emblem)
Our Members
Do Not Patronize
Newberry's
Retail Clerks Union
Local #560."

At the same time Newberry was placed on the Union's unfair list. Such picketing continued to and including April 8, 1953, at which time Newberry filed a complaint in the district court praying for a restraining order. The Honorable W. C. Loofbourrow, District Judge, issued an order directing the Union to show cause why an injunction pendente lite should not be granted. Picketing pending the hearing was enjoined. Further hearings on the matter were referred to the Honorable Hugh A. Baker by order of the Court.

The Union appeared as directed and filed a motion to quash, and set aside the temporary restraining order, in which motion it contended the restraining order contravenes the 1st and 14th Amendments to the Constitution of the United States, and Art. I, Secs. 9 and 10 of the Constitution of Idaho, and further that the court was without jurisdiction in the matter for the alleged reason that the matter complained of had been pre-empted by the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. 141 et. seq.

The motion to quash was heard, and on March 31, 1953, the court entered an order denying the motion and enjoined the Union, pending the action and until final determination thereof, from picketing Newberry's business or interfering with prospective patrons, or placing Newberry on its unfair list.

Thereafter the Union filed an amended answer to Newberry's amended complaint.

On issues joined, trial was held in April, 1954, and the court thereafter made findings of fact and conclusions of law and entered judgment favorable to Newberry.

The trial court, among other findings found:

"VI.

"That at all times since August 13, 1952, and at the time of, and during the picketing set forth above, the said union did not have the contractual right to, nor did it act for or in behalf of plaintiff's employees and did not act at the instance of, request of, or approval of said plaintiff's employees; that said picket was placed by said defendants, without the knowledge of plaintiff's employees and without any authority from plaintiff's employees or any of them.

"VII.

"That at no time did the defendant union, or any of its representatives or agents, present to or discuss with plaintiff, a contract or proposed agreement.

"VIII.

"That at no time was there a dispute or controversy between the employer and its employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives.

"IX.

"That the purpose of placing said picket by the defendant union was unlawfully to intimidate, coerce and compel plaintiff to enter into an agreement with defendant union, and by the use of economic coercion by defendants, to destroy plaintiff's freedom of contracting.

"XI.

"That in addition to placing the picket, and for the same purposes, defendants secured the placement of the plaintiff on the 'unfair list' of Retail Clerks International Association, Local No. 560, Pocatello Building Trades Council, and Pocatello Central Labor Union."

By the terms of the judgment the Union, its officer, members, agents, servants and all persons acting in aid of or in conjunction with them or any of them were permanently enjoined from picketing Newberry's place of business. From the judgment and an order denying a new trial the Union appealed.

In assignments of error the Union contends: First, that the court erred in holding that it has power and authority to hear and determine the issues for the alleged reason that Newberry had failed and neglected to exhaust remedies available before the National Labor Relations Board pursuant to 61 Stat. 136, 29 U.S.C.A. §§ 141 et seq., 151 et seq.;

Second, that the trial court usurped power and authority of the Federal National Relations Board to process, hear and determine the grievances and subject matter set out in plaintiff's amended complaint and the evidence offered in support thereof;

Third, the Union challenges the jurisdiction of the trial court to decide the issues for reasons set forth in assignments 1 and 2;

Fourth, that the conduct complained of was and is the lawful exercise of freedom of speech and the press, protected by the 1st and 14th Amendments to the Constitution of the United States, and Art. I, Secs. 9, 10, and 13 of the Constitution of Idaho;

Fifth, that the trial court's decision is contrary to and is forbidden by Sec. 44-703, I.C.;

Sixth, that the trial court failed to designate and define or describe an employing unit in his findings.

Assignments of error 7, 8, 9, and 10 challenge the jurisdiction of the court, the general contention being that a labor dispute existed which is exclusively to be heard and determined by the National Labor Relations Board.

Assignment of error 11 claims the court erred in denying a motion for a new trial on substantially the same grounds as are set forth in the assignments of error and contentions of the Union overlap and the same general proposition advanced in one is covered by others.

In points and authorities to sustain the above assignments of error the Union contends that Newberry should have exhausted its remedy before the National Labor Relations Board pursuant to 29 U.S.C.A. § 160, Labor Management Relations Act, commonly known as the Taft-Hartley Law; that the jurisdiction of the state court to hear and determine the cause has been superseded and pre-empted by an Act of the United States Congress, 29 U.S.C.A. § 151 et seq.; that Sec. 44-703, I.C. prohibits the issuing of the injunction; that the complained of picketing, publicity and advertising activities of the Union are constitutionally guaranteed.

Basically the contentions and assignments of error present for decision the question of the jurisdiction of the court to hear and determine the matter and the protection that is afforded the Union by the provisions of the United States and State Constitutions guaranteeing freedom of speech and of the press.

(1) That National Labor Relations Act as amended by the Taft-Hartley Law, 61 Stat. 136, Ch. 120-29 U.S.C.A. § .... et seq., regulating labor relations affecting commerce, is specifically limited to a labor dispute and also one that affects commerce.

29 U.S.C.A. § 142 defines the subject matter regulated by the Congressional Act in words as follows:

> "When used in this chapter—
>
> "(1) The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce."

The Labor Relations Act, 29 U.S.C.A. § 152 (9) defines a labor dispute as:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

By the definitions above quoted the activities of the Union here complained of are not specified and do not come within the Congressional enactments covering labor practices or labor disputes affecting interstate commerce.

Whether Congress has foreclosed state regulations in all cases where a labor dispute exists and interstate commerce is involved is not presented for determination.

The activities and conduct of the Union here complained of have neither been approved nor prohibited by the National Labor Relations Act, and are not within the categories covered therein. Hence the Union cannot successfully attack the jurisdiction of state courts on the ground that Newberry failed to exhaust administrative or judicial remedies available under the Labor Management Relations Act, or that the activities complained of have pre-empted or covered in the anti-injunction act, 47 U.S. Stat. at Large, 70, 29 U.S.C.A. §§ 101 to 115, or the National Labor Relations Act, 29 U.S.C.A. §§ 151 to 168 inclusive. Milwaukee Boston Store Co. v. American Federation of Hosiery Workers, 269 Wis. 338, 69 N.W. 2d 762; General Building Contractors' Ass'n. v. Local Unions, 370 Pa. 73, 87 A. 2d 250, 32 A.L.R. 2d 822; International Union, U.A.W., A.F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S. Ct. 516, 93 L. Ed. 651; G., H. & E. Freydberg, Inc. v. International Ladies' Garment Workers, Sup., 128 N.Y.S. 2d 470; International Molders and Foundry Workers' Union v. Texas Foundries, Tex. Civ. App. 241

S.W. 2d 213; Elle v. Pocatello Bldg. & Const. Trades Council, and Simplot v. Pocatello Bldg. & Constr. Trades Council, Idaho, 297 P. 2d 519.

Cases cited by the Union purporting to express a contrary view covering situations coming within the provisions of the Labor Management Relations Act, 29 U.S.C.A. §§ 141 et seq., 151 et seq. are not in conflict with the views herein expressed. Further the Union had already had a hearing before the National Labor Relations Board and on issues presented, the Board determined the controversy favorable to Newberry.

No administrative or judicial remedies covering the present situation are provided in the Congressional enactments above cited and the contention that Newberry should have exhausted such remedies is not sustainable. Further, if the Congressional enactments covering labor disputes were applicable, such remedies would have been futile. Before the machinery could have been put in operation the wrong complained of and prohibited by the injunction would have been accomplished.

The contention of the Union that the injunction issued in this case is in violation of and forbidden by subd. (e) of Sec. 44-703, I.C., is without merit.

(2, 3) There was no labor dispute existing between Newberry and its employees, or any of them. The restriction on issuing an injunction in certain cases specified in said Section 44-703, I.C. without following a specified procedure refers to a controversy between the employees and employer. In the present situation the Union represented none of Newberry's employees, none desired Union representation, and none of such employees took any part in the picketing of the Newberry store. There being no labor dispute as defined by Sec. 44-712, I.C., the said statute, Sec. 44-703, I.C., has no application to the situation, and the trial court's jurisdiction was not limited or restricted. Elle v. Pocatello Bldg., & Const. Trades Council, supra, and

Simplot v. Pocatello Bldg. and Const. Trades Council, supra.

The Union contends that the advertisements and picketing complained of were a proper exercise of freedom of speech and of the press permitted by the 1st and 14th Amendments to the Constitution of the United States, and Art. I, Secs. 9, 10 and 13 of the Idaho Constitution.

(4-6) The trial court correctly found that the picketing was for an unlawful purpose, i. e., for the purpose of unlawfully intimidating and coercing Newberry to enter into an agreement with the Union and to destroy Newberry's freedom of contracting. The constitutional provisions above cited do not prevent or prohibit the affording of appropriate remedies for the abuse of the constitutional guaranties. Robison v. Hotel & Restaurant Employees Local No. 782, 35 Idaho 418, 207 P. 132, 27 A.L.R. 642; Elle v. Pocatello Bldg. & Const. Trades Council, supra, and Simplot v. Pocatello Bldg. & Const. Trades Council, supra. Picketing and advertising for an unlawful purpose are subject to injunctive relief. Tarr v. Amalgamated Ass'n, etc., 73 Idaho 223, 250 P. 2d 904.

(7) The contention of the Union that the trial court failed to define or describe an employing unit is of no materiality. The Union attempted, without authority, to represent employees of Newberry's Pocatello store. The employing unit of the one store presented the only issue. The election to be held August 13, 1952, covered only the employees of the one unit and the charges made before the National Labor Relations Board applied to the same business. There was no showing that other businesses were in any wise involved and the Union is not in a position to complain that an employing unit was not defined.

The right to engage in business or follow any lawful calling is a right open to all persons, together with the further right to conduct such business or calling without unlawful interference from others.

The motion for a new trial was properly denied. Judgment is affirmed. Costs to respondent.

TAYLOR, C. J., ANDERSON and SMITH, JJ., and BECKWITH, District Judge, concur.

APPENDIX B

TITLE OF COURT AND CAUSE:

MEMORANDUM OF DECISION

The major facts are set forth in the memorandum of decision of August 19, 1953, on the order to show cause and motion to dissolve the restraining order. I shall not restate fully but some restatements or additions seem to be warranted. I shall not cite the specific cases or quote the provisions of the Federal statutes which to my mind support the conclusions reached. All are cited in briefs of counsel.

Defendant union appears still to assert a majority representation subsequent to August 13, 1952, the date upon which the election was to have been held, to and including the date upon which the picket was established in March, 1953. The facts which should have indicated to the union before August 13, 1952, that a majority of plaintiff's employees did not desire to be represented by the defendant union are detailed in the memorandum of August 19, 1953. The election scheduled for August 13th, 1952, was of plaintiff's qualified employees; the question to be answered was whether the defendant union was to represent them. Before that date the defendant was informed that no employee would vote or vote favorably. The union did not choose to hold an election when faced with the certainty of defendant so cancelled the election. On about the same day the union filed with the National Labor Relations Board a complaint alleging, as I understand the record, that the plaintiff had "dissipated" the union's majority. To my mind the charge itself involved at least the following: First,

The assertion that by action of the employees the union had obtained the right of representation; second, a most solemn declaration that it had lost and no longer enjoyed that right; and, third, a charge that it had suffered the loss through interference by the plaintiff. The decision of the board was not favorable to the union. The evidence discloses that not a single employee of the plaintiff signed a representation agreement or application for membership or had anything to do with the union after August 13th. It is difficult for me to see how the union can persist as it does in its assertion of majority representation. If the union represented after August 13, 1952, any of plaintiff's employees through their choice or with their consent it was of a very small minority. The union's activity after August 13, 1952, was on its initiative and not at the instance or request or with the approval of plaintiff's employees.

In their briefs counsel for the defendants several times refer to the fact that the manager of plaintiff's store at Pocatello, shortly after the conversation between him and Mr. Lenaghen regarding representation or representation contract, obtained a copy of the union contract and union wage scale in a similar business at Pocatello and promptly caused plaintiff's wage scale to conform to it and, so far as the record discloses, also brought all working conditions up to the union standard. I am unable to see how this fact can be of particular aid to the defendants or how it can of itself confer upon them the right to picket or in any manner affect that right. This circumstance undoubtedly gave substantial comfort to the union in that it justified at least a right to suspect that union activity had been effective even in non-union stores. But unjust enrichment or quantum meruit seems to have no place in the case.

Nor can I see how or why the fact that the defendants in August, 1952, established a picket is of importance. The two picketings were in no manner connected, the second was not a continuation of the first. The first picketing ended months before the second began. Relationship of

the parties were not identical. The circumstances preceding and connected with the second picketing more strongly indicates a coercive purpose than the first.

The defendants renew and vehemently advance the position they took on the hearing on the order to show cause and to dissolve that Congress, by enacting the several labor laws relating to businesses engaged in commerce, had assumed a Federal jurisdiction over controversies of this character and had given the National Labor Relations Board an exclusive jurisdiction, that plaintiff's sole remedy is by resort to the Board and that the state court is without right to take notice of the controversy or to proceed. It was my decision on the order to show cause and the motion to dissolve that jurisdiction of the Board over charges against labor organizations exists and is exclusive only when the charge amounts to an unfair labor practice as defined in the Federal statute and that where the charge is not one condemned by Congressional Act there is no limitation on the right of a state or its courts to take notice of the controversy. To my mind the controlling authorities support that decision.

I am not convinced that counsel for the defendants actually disagree with that conclusion. A careful reading of their briefs indicates their final position is not accurately set forth in some of the broad statements made in their briefs. While there is no express admission by counsel there seems to be a recognition of the principle that the Board has jurisdiction only when an unfair labor practice is involved and unless so involved the state courts may take notice of, hear and decide the controversy as state law, written or common, seems to require. Counsels' argument seems to be based upon a premise that the case actually involves a charge of unfair labor practice.

The defendants insist that the picketing was either the innocent and unactionable exercise by them of their right freely to speak or was for the improper purpose coercively

of bringing about membership in the defendant union of all of plaintiff's eligible employees. They assert that if the picketing was solely for the purpose of imparting information, no cause of action, despite resulting damage, can be based upon or grown out of the exercise of their guaranteed right of free speech; also that if the purpose of the picketing was directly or indirectly through the plaintiff, to coerce membership in the union by plaintiff's employees an unfair labor practice is established over which the National Labor Relations Board has complete, and this court is without, jurisdiction and must cease to take notice of the controversy. If the picketing can have no other purpose, the conclusion of defendant's counsel appears to be correct.

At the time of the hearing on the order to show cause and the motion to dissolve no pleading on behalf of the defendants setting forth their purpose in picketing was on file. No definite issue of fact was made by the pleadings and no general limitation or restriction of the right to testify or nature of the inquiry was imposed. Mr. Lenaghan and Mrs. Denkers testified in substance that the picket was established solely for the purpose of informing union members and friends that the plaintiff was operating a non-union store and not for the purpose of influencing anyone to refrain from visiting or purchasing at plaintiff's store. But it seemed fair to assume from Mr. Lenaghan's testimony that he expected the plaintiff to sustain a financial loss through the picketing. The circumstances antecedent to and connected with the picketing caused me to believe and to decide that the picketing had a purpose or aim other than merely to give information, was in fact and was intended to be coercive in character or sufficiently indicative of coercion and improper purpose to warrant injunction pendente lite.

Following that decision a formal answer subsequently supplanted by amended answer, was filed. In the answer we have for the first time a declaration by the defend-

ant of the purpose of the picketing. In the amended answer the defendants deny all purpose of coercion and allege:

> "* * * defendants aver that such advertising and picketing initiated and caused by the defendant labor organization was for the proper and lawful purpose of communicating information to and apprising members of the defendant labor organization and other members of organized labor affiliated therewith, that plaintiff did not display the Union Store Card, that plaintiff was unfair to organized labor and that there were other stores in Pocatello, Idaho, that displayed the Union Store Card * * *
>
> "* * * these defendants aver that the intention and purpose of these defendants in so initiating and placing such picket advertising was to avoid the disestablishment of the established prevailing scale and rate of hours, wages and other conditions of employment of the members of organized labor and their affiliates and friends in Pocatello city and vicinity, and to support, protect and maintain such established, prevailing hours, wages and other conditions of employment"

On the trial on the merits Mr. Lenaghan and Mrs. Denkers testified that the union concluded to organize the "soft goods" businesses in Pocatello, decided to "concentrate" on Newberrys and established the picket for the purpose of diverting business from the plaintiff to stores displaying the Union Store Card. To my mind such testimony disproves the pleaded defense and establishes the coercive purpose of the picket. It is difficult to see how coercion, unless expressly admitted, could be more definitely established. Such testimony leaves no room for the position that the picket was placed for the purpose only of imparting information.

In support of their position that the acts of the defendants, if not in the exercise of their right of free speech, constituted an unfair labor practice, counsel in their briefs make much of the fact that upon the hearing on the order

to show cause and to dissolve plaintiff amended its complaint by eliminating the allegation that a purpose of the picketing was to coerce the plaintiff into requiring its employees to join the defendant union. I believe we may agree that to the extent the original complaint alleged a purpose to coerce membership in the union, an unfair labor practice was pleaded but that was but one of the two charges made against the defendants. I believe all parties now agree that if that charge were the only complaint made against the defendants or if it had been retained in the complaint and if the evidence submitted either by the plaintiff or the defendants established the truth of the charge, we would be obliged to say to the plaintiff that its complaint should be dismissed for the state court is without jurisdiction and that plaintiff's exclusive remedy is by application to the National Labor Relations Board for relief. The plaintiff had the legal right to amend and to remove from its complaint all allegations amounting to a charge of unfair labor practice and to base its cause of action upon contentions which do not bring the case within the jurisdiction of the Board. Before the hearing on the order to show cause and motion to dissolve, the complaint was amended and the charge of unfair labor practice was removed as completely as if it had never been mentioned. I cannot agree with counsel for the defendants that the removed allegations retain the potency or importance claimed for them. I do however, agree with the defendants that if the evidence established an unfair labor practice on the part of the defendants, that is, that the picketing was conducted for a purpose condemned by the Federal Act, the complaint should be dismissed upon the ground of absence of state jurisdiction.

Defendants also argue that if coercion was their purpose it would, in the very nature of things, involve more than the execution by the plaintiff of the representation contract; it would continue until organization had become a fact fully accomplished by membership of plaintiff's

eligible employees in the union; that the execution of representation contract would amount to but little; that if we attribute to the defendants the purpose of obtaining the execution of a representation contract, we must also attribute a purpose to do everything to make that contract fully effective. Defendants argue, and their position seems to be sound, that such purpose would amount to a prohibited labor practice. While it may be difficult to believe the defendants could have accomplished organizaiton of plaintiff's store without or that they actually contemplated less than full membership, a finding to that effect would not be supported by the pleadings or the proof. To find that the purpose of the picketing was to intimidate or to coerce membership of plaintiff's employees would be to read into the pleadings an averment not now found and to charge witnesses with a purpose which they disclaimed. All that was ever involved was the execution of the representation contract. While employee membership would in all probability follow, nothing was before the parties except the execution of representation contract. That was all the defendants then sought and execution was all that was required to bring about the removal of the picket as counsel for the defendants state in their briefs. Other actions would likely have followed within a short time but it was evidently the union's position that it would meet or would project but one question at a time. We are now concerned with nothing but the first.

If it was the defendants' purpose to coerce the employees into membership, they had full opportunity to plead and to prove that fact with every right to believe that dismissal of the case would follow the appearance of the fact. But the defendants could not have been expected to do that and to establish so clearly and irrefutably the violation by them of the Federal statute and a clear case against them within the jurisdiction of the Board. In such situation it is understandable why the defendants would invite a finding by the court of an unfair labor prac-

tice which they would hesitate to prove; there is a substantial difference, from defendants' standpoint, between a finding by the court of an unfair labor practice and their intentional proof of it.

As I understand the plaintiff's position it is that the representation contract is not "unlawful" because of inherent illegality either in terms or in operation but because of the manner in which it was sought to bring about its execution; that there was absent that freedom of choice essential to a valid contract; that the defendants relied upon the prospect of ending the financial loss the plaintiff was sustaining with consequent removal of the picket to bring about the execution of the contract. I believe and find that the purpose of the picketing was to divert business from plaintiff's store in such volume and for such indefinite period as would prove to be sufficient to bring about the execution of the representation contract. The manner in which the picketing was conducted was inoffensive but its purpose condemns it.

The evidence discloses that the picketing was successful in that it kept and brought prospective customers out of the plaintiff's store and that the plaintiff sustained substantial loss. I am, however, unwilling to charge the defendants with full responsibility for the amount of plaintiff's reduced volume of trade during the year 1953 or during the period of and immediately following the picketing. In my opinion an award of damages would, as to amount, be arbitrary. The impossibility of proving or determining with even approximate accuracy the damage sustained establishes the inadequacy of the remedy at law and renders injunctive relief proper.

The plaintiff will be granted the injunctive relief it seeks. While it will be found that the plaintiff sustained substantial financial loss or damage no specific sum will be allowed.

Will counsel for the plaintiff prepare, serve upon counsel for the defendants and submit proposed findings, conclusions and decree? In this case the defendants will be given the period of fifteen days within which to serve and lodge objections to proposed findings, conclusions and decree and request for substituted or additional findings and conclusions. I shall then examine the lodged objections, etc., and if I desire to hear counsel shall fix a date therefor at Pocatello.

Dated November 12, 1954.

HUGH A. BAKER,
District Judge.

(ENDORSED:)

FILED FEB. 24, 1955—9:23 AM
SARAH DEVANEY, CLERK, AUDITOR & RECORDER
BANNOCK COUNTY, IDAHO.

Office - Supreme Court, U.S.
FILED
DEC 27 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 597

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a labor organization; ROBERT LENAGHEN, LORA DENKERS, MEL SIMPSON,

Appellants,

v.

J. J. NEWBERRY COMPANY, a corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

MOTION TO DISMISS APPEAL AND BRIEF OF APPELLEE

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 597

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a labor organization; ROBERT LENAGHEN, LORA DENKERS, MEL SIMPSON,

Appellants,

v.

J. J. NEWBERRY COMPANY, a corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

Motion to Dismiss Appeal

Appellee moves the Court to dismiss the appeal herein with costs to appellee on the ground that

1. The appeal is not within the jurisdiction of this Court, because not taken in conformity to Statute.

2. That the question of constitutionality of the Idaho Statute, on which appellants base their alleged

right to appeal, was not timely or properly raised, or expressly passed on by the State Court.

3. The judgment appealed from rests on an adequate non-federal basis.

Dated: December 26, 1956.

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IN THE

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Appellants,

v.

J. J. NEWBERRY COMPANY, a corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF OF APPELLEE ON MOTION TO DISMISS APPEAL

POINT I

No question of the constitutionality of a state statute is involved, nor was any such question raised by appellants in the State Court, nor passed upon by that court.

The notice of appeal (par. I) states that the appeal is taken pursuant to 28 U. S. C. A., §1257, sub-section (2). 28 U. S. C. A. §1257 provides:

"§1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the

highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Paragraph III of the notice of appeal states the questions which appellants claim are presented by this appeal. The only question listed in the notice of appeal which it is claimed in any way involves the constitutionality of a State Statute is in paragraph III, subdivision 2 of the notice of appeal, which reads as follows:

"2. Whether Section 44-712, Idaho Code, as applied in this case is unconstitutional (a) as in conflict with the National Labor Relations Act, as amended, or as invading the field which Congress has occupied by the enactment of that statute; or (b) as in violation of the 14th Amendment of the Constitution of the United States."

One of the contentions made by the appellants in the State Courts was that the Idaho Court was prohibited from granting the injunction which was granted in the court below by the provisions of §44-703 of the Idaho Code which provides as follows:

"44-703. *Injunctions—Restrictions on issuance.*—No court, nor any judge or judges thereof shall have jurisdiction to issue any restraining order or temporary or permanent injunction which in specific or general terms prohibits any

person or persons from doing, whether singly or in concert any of the following acts: * * *

(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;"

The above section is found in Title 44, Chapter 7 of the Idaho Code, which chapter is entitled "Injunctive Relief in Labor Disputes." It was enacted as a single piece of legislation restricting the use of injunctions in labor disputes.

§44-712 of the Act defines a labor dispute as follows:

"44-712. *Labor dispute defined.*—The term "labor dispute" means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

The Idaho Court in the case at bar found that there was no labor dispute under §44-712 of the Idaho Code, and that, therefore §44-703 did not apply.

That the term "dispute", as used in §44-703 means "labor dispute" as defined in §44-712, had been held in prior decisions of the Idaho Supreme Court:

Poffenroth v. *Culinary Workers Union,* 71 Ida. 412, 232 Pac. (2d) 968;

Tarr v. *Amalgamated Association of Street & Electricity Railway & Motor Coach Employees of America,* 73 Ida. 223, 230, 250 Pac. (2d) 904.

The interpretation by a State Court of a State Statute does not raise a federal question. Moreover in the case at bar the State Court held that the State Statute did not apply. Assuming, for the sake of argument only, that the State Statute is unconstitutional, as stated in paragraph III subdivision 2 of the notice of appeal, the State Statute would still not apply, as there would in effect be no State Statute. Even if the State Statute were held to be unconstitutional, as contended by appellants, the decision of the State Court would not be affected.

Furthermore, neither in their brief on the appeal to the Idaho Supreme Court, nor in their assignments of error on that appeal, did the appellants raise or argue the question of the constitutionality of §44-712 of the Idaho Code. The first time that question has been raised, so far as the record shows, was in the notice of appeal to this court from the judgment of the Supreme Court of Idaho.

POINT II

The other questions argued in the jurisdictional statement.

Despite the statement in the notice of appeal basing the appeal on 28 U. S. C. A. §1257, subsection 2, the jurisdictional statement filed by appellants argues that there are questions involved other than the unconstitutionality of the state statute, on which this court should take jurisdiction.

In the jurisdictional statement, appellants in fact did not argue the question of constitutionality, but merely stated that such a question was presented. They apparently assumed that this Court, if it rejected the question of unconstitutionality of the state statute as a ground for appeal, would nevertheless treat the notice of appeal as a petition for a writ of certiorari to review the judgment appealed from, under 28 U. S. C. A. §1257, subsection 3. The granting of a writ of certiorari is, of course, a matter of discretion which, we respectfully submit, should not be exercised in this case.

A

The claim of "federal preemption"

Appellants' claim that the National Labor Relations Board had exclusive jurisdiction is based in part, at least, on the allegations of the original complaint (J. S. p. 5). The complaint, however, was amended at the opening of the preliminary hearing (R. 348-

350). Under the Idaho practice the amended complaint takes the place of the original complaint, which then ceases to have any further function as a pleading. This is so even if a preliminary motion or order has been issued on the original complaint. It is the amended complaint which must be resorted to in determining the issues tendered, the allegations made, and the facts and evidence to be admitted.

> *First N'l. Bank of Logan, Utah* v. *Colliers, et al.*, 51 Ida. 689, 9 Pac. (2d) 802;
> *Cable* v. *Olson*, 52 Ida. 389, 15 Pac. (2d) 737;
> *Colgrave* v. *Hayden Lake Irr. Dist.*, 40 Ida. 489, 235 Pac. 434.

The relative portions of paragraph 5 thereof stated the purpose of the picketing by the defendants as follows (R 350):

> "* * * and for the purpose of intimidating, coercing and compelling the said plaintiff to enter into an unlawful agreement with the defendant union did, on March 31, 1953, place and post pickets immediately in front of the entrance to the premises of the plaintiff, the sole purpose of the defendants in picketing the plaintiff's place of business is to initimdate, coerce and compel the plaintiff to enter into an agreement with the defendant union, all of which is contrary to the laws and public policy of the State of Idaho."

The defendant's amended answer (par. 3) admits that the defendants caused the picketing to take place substantially as alleged in paragraph 3 of the amended complaint, and continues as follows (R. 396, 397):

> "* * * further answering said paragraph, these

> defendants aver that such advertising and picketing initiated and caused by the defendant labor organization was for the proper and lawful purpose of communicating information to and apprising members of defendant labor organization and other members of organized labor affiliated therewith, that plaintiff did not display the Union Store Card, that plaintiff was unfair to organized labor, and that there were other stores in Pocatello, Idaho, which displayed the Union Store Card, and that members of such organizations and affiliates should patronize union stores in Pocatello, Idaho, that displayed the Union Store Card."

Paragraph V of the amended answer denies the allegations of paragraph 5 of the amended complaint and continues as follows (R. 397):

> "* * * and further answering said paragraph 5 these defendants aver, that the intention and purpose of these defendants in so initiating and placing such picket advertising was to avoid the disestablishment of the established prevailing scale and rate of hours, wages and other conditions of employment of the members of organized labor and their affiliates and friends in Pocatello City and vicinity, and to support, protect and maintain such established, prevailing hours, wages and other conditions of employment.

The right of the National Labor Relations Board to grant relief by injunction is based on §10(a) of the Labor Management Relations Act, 29 U. S. C. A. §160(a), which reads as follows:

> "(a) The Board is empowered, as hereinafter

> provided, to prevent any person from engaging in any unfair labor practice (listed in §158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement or otherwise: * * *"

§8 of the Labor Management Relations Act (29 U. S. C. A. §158) defines the unfair labor practices referred to in §10(a).

§8(a) deals with unfair labor practices on the part of an employer and is not involved, since it is the action of the Union as to which complaint was made and proof adduced.

§8(b) deals with unfair labor practices on the part of a labor organization or its agents. A reading of this section shows that there was no unfair labor practice, as defined in that section, either alleged or proved, in the case at bar. This is true whether we take the allegations and claims of the plaintiff or those of the defendants. Neither party either alleged or proved the existence of an unfair labor practice within §8(b).

§8(b)(1) makes it an unfair labor practice for a union to force employees in their right to join or to refuse to join a union or to exercise any of the other rights given them by §7 of the Labor Management Relations Act. There is no issue or allegation in this case of any coercion by defendants of, or attempt by defendants to coerce, the plaintiff's employees. Plaintiff alleged that the purpose of the defendants' picketing was to coerce the *employer* into signing a contract and the State Court so found (R. 440).

§8(b)(2) makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against employees with respect to hire or terms of employment in order to encourage or discourage union membership. No such conduct was either pleaded or proven in the case at bar. In fact the record shows that no specific form of contract was ever offered to the plaintiff employer. It was merely asked "to sign a contract" and, on its refusal to do so, the events followed which culminated in the defendants placing a picket in front of plaintiff's store.

§8(b)(3) makes it an unfair labor practice for a union to refuse to bargain collectively with an employer and is clearly not involved in this action.

§8(b)(4) makes it an unfair labor practice for a union to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle any goods or commodities or to perform any services, for any of the four objects enumerated in that section. In the case at bar there was no strike, nor any attempt to induce the employees to strike or to do anything else. This §8(b)(4) is primarily the secondary boycott section and does not apply in this case.

Appellants rely mainly upon the decisions of this Court in *Garner* v. *Teamsters Union*, 346 U. S. 485 and *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468.

In the *Garner* case the complaint charges and the lower court found that the defendant union's purpose

in picketing was to coerce the plaintiffs into compelling or influencing their employees to join the union (p. 487). This was held by this Court to be an unfair labor practice under §8(b)(2) of the Labor Management Relations Act (29 U. S. C. A. §158), on the ground that the plaintiffs had claimed, and the State Court had found, coercion by the defendant union directed against the employees, to influence or compel them to join the union. On the basis of this finding of conduct constituting an unfair labor practice under the Labor Management Relations Act, this Court necessarily applied the rule of "federal preemption". As we have pointed out, no such coercion of the employees was alleged or proved in the case at bar, and there was no finding of any such coercion.

The opinion in the *Garner* case, moreover, at page 488, contains the following statement: "Nor is there any suggestion that respondent's plea of federal jurisdiction and preemption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked."

The National Labor Relation Board has squarely indicated in its decisions that peaceful picketing of an employer for the purpose of gaining or maintaining recognition by him of the union, where no other union has been certified as bargaining agent, is not an unfair labor practice under §§8(b)(1)(A) or 8(b)(2) of the Labor Management Relations Act, and the Board has therefore no power to regulate such conduct, or to grant any relief whatsoever.

United Mine Workers (M. F. Fetterolf Coal Co.), 32 L. R. R. M. (Labor Relations Reference Manual) 1028, 1029;

Painters' Union (Higbee Co.), 29 L. R. R. M. 1151, 1152.

The General Counsel of the National Labor Relations Board, under §3(d) of the Labor Management Relations Act has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under §10" of the Act. The General Counsel has consistently sustained the Regional Directors of the National Labor Relations Board in their refusal to issue complaints charging a union with an unfair labor practice based on picketing for the purpose of recognition.

See *Administrative Rulings of the N. L. R. B. General Counsel*, Case No. 840, 33 L. R. R. M. 1037; Case No. 106, 35 L. R. R. M. 1246; and Case No. 1133, 35 L. R. R. M. 1533.

In the *Weber* case the complaint alleged that the strike called by the defendant union constituted "a secondary boycott under the common law of the State of Missouri" and also was in violation of subsections (A), (B) and (D) of §8(b)(4) of the Taft-Hartley Act, and of §303(a)(1)(2) and (4) of that same Act (Opinion, p. 471). In the face of such affirmative pleading this Court necessarily and correctly held that jurisdiction lay with the National Labor Relations Board. On the other hand, in the case at bar there was no allegation and no proof of any unfair labor practice on the part of the defendant union under the Labor Management Relations Act.

The cases cited by appellants on pages 14 and 16 of the Jurisdictional Statement are distinguishable on the same ground. In *Building Trades Council* v. *Kinard Construction Co.* the complaint alleged that the picketing by defendant was for the purpose of coercing the plaintiff to force its employees to join the union, which the State Court held was an unfair

labor practice under §8(b)(1)(A) and (B) of the Labor Management Relations Act. In *Teamsters Local* v. *N. Y., N. H. & H. R. R. Co.* the amended complaint specifically alleged a violation of the Act, while in *Pocatello Building & Construction Trades Council* v. *C. H. Elle Construction Co.*, the State Court held that the activities of the Union amounted to a secondary boycott, which is an unfair labor practice under §8(b)(4).

The State Courts have interpreted the *Garner* decision as depriving them of jurisdiction where an unfair labor practice under §8 of the Labor Management Relations Act is alleged by either party. Where the pleadings do not show an unfair labor practice the State Courts have assumed jurisdiction and the *Garner* case has been distinguished on that ground.

International Assn. of Machinists A. F. L. v. *Goff-McNair Motor Co.*, 223 Ark. 30, 35, 36, 264 S. W. (2d) 48, 50;
Benjamin v. *Foill*, 379 Pa. 540;
Morgan Millwork Co. v. *Highway Truck Drivers etc.* (Del.), 112 Atl. (2d) 855.

We submit that the conduct of the defendant union in the case at bar did not constitute an unfair labor practice under §8 of the Labor Management Relations Act; that there was, therefore, no remedy by injunction in the National Labor Relations Board, and that the action for injunction was therefore properly brought by the appellee in the Idaho Court.

Auto Workers v. *Wis. Board*, 336 U. S. 245;
United Workers v. *Laburnum Corp.*, 347 U. S. 656.

B

Question of "free speech"

In order to discuss this question, a consideration of the background of the case is necessary. In June, 1952, the union representative, Mr. Lenaghen, saw the store manager, Mr. Dunagan, at the plaintiff's store, indicated that a majority of the store employees desired to join the union, and asked him to sign a union contract. No specific form of contract was ever discussed. Mr. Dunagan replied that this matter would have to be taken up with the Los Angeles office. Thereupon the union filed with the National Labor Relations Board a demand for an election, to which the plaintiff employer consented. In August, 1952, a few days before the date fixed for the election, Mr. Lenaghen was notified by two of the employees that none of the employees would attend the meeting nor vote for the union. The plaintiff's employees were almost all women clerks, several of whom were on a part time basis. The demand for an election was withdrawn by the union, which then filed with the National Labor Relations Board a complaint charging the Newberry Company with an unfair labor practice in that it had "dissipated the union's majority." By this method they hoped to obtain an order granting them rights as a bargaining agent despite lack of a current majority. In August, 1952, also, the Newberry Company was placed on the unfair list of the local Retail Clerks Union and a request was made to the Central Labor Council and the Building Trades Council to place the Newberry Company on their lists, which was done by the Central Labor Council in January, 1953, and by the Building Trades Council in March, 1953 (R. pp. 285, 286).

A hearing was held and on February 24, 1953, the National Labor Relations Board's examiner issued his Recommended Order that the union complaint be dismissed as without foundation. When the union received a copy of this order, it authorized Mr. Lenaghen to place a picket in front of the Newberry store at a time completely within his discretion. The store was not picketed at that time, Mr. Lenaghen testifying that this was because of inclement weather, although on cross-examination he admitted that the weather had not been inclement during the entire period in question. On March 25, 1953, the final order of the National Labor Relations Board was issued. This was received by Mr. Dunagan on March 28, 1953, and by the union at approximately the same time. On March 31, 1953, the picket was placed before the Newberry store. Thus, after exhausting their legal remedies without success, the union took matters into its own hands. No attempt had been made by the union to contact any of the Newberry employees since August, 1952. No attempt had been made to secure information regarding prevailing wages, working conditions in the Newberry store, nor to ascertain if any of the employees employed in June, 1952 were still employed. Three other similar non-union stores in Pocatello were not picketed. There was no occurrence of any kind to explain this sudden activity on the part of the union, except that the union had completely lost its attempt to organize. The inference is clear that the picket was the result of resentment on the part of the union at this loss, and was for no other purpose than to strike back at the Newberry Company, to cause it injury and loss of business, and to use the force of economic coercion to secure what it had not been able to secure by legal means.

It is significant that the picket was placed during the week preceding Easter, normally a period of increased sales, and that the picket appeared during the afternoons, when business was normally at its peak. Pocatello is a strong union town with about 7000 union members in a population of 26,000. The testimony showed a considerable falling off of business during the picketing periods and the Court found that the Newberry Company had been damaged as a result of the picketing, though no damages were awarded, because of inability to determine the amount with accuracy.

The sign carried by the picket was not the usual "unfair" sign, but a special sign with special wording which required considerable discussion, according to Mr. Lenaghen, at the meeting of the union executive board. One side of this sign read:

"Members and Friends of Organized Labor

We Need Your Help

Please shop at stores that display this sign

(Union Store label)"

This was not mere advertising to the public that the Newberry store did not have a union contract. It was a deliberate attempt on the part of the union to create in the minds of the public the impression, by the use of the words "We need your help", that the Newberry store was engaged in a labor dispute with its employees, and that the employees were appealing to the public for help.

In this connection, the testimony of Mr. Lenaghen on the preliminary hearing is significant (p. t. f. 41):

"Q. Now, you not having contacted in any shape, manner, or form the Newberry Company for several months, and they not having contacted you, will you explain to the Court the Union's purpose of placing the picket in front of Newberry's place of business? A. Yes, sir; we were merely trying to advertise to the public a dispute existed with the Newberry Company and their employees."

As to the claim in the defendant's amended answer that the purpose of the picketing was to "avoid disestablishment of the established prevailing scale and rate of hours, wages and other conditions of employment of the members of organized labor in Pocatello and vicinity", the testimony shows that the union had no knowledge as to the existing wage scale and working conditions in the Newberry store, and that, as a matter of fact, the wages paid were the same as, or better than, the union scale.

The Idaho Circuit Court held that the purpose of the picketing was not to inform the public that Newberry's was not a union shop, as contended by the defendant, but was an unlawful purpose i. e., the purpose of unlawfully intimidating and coercing Newberry to enter into an agreement with the union, and to destroy Newberry's freedom of contracting, and was, therefore, subject to injunctive relief (J. S. p. 9-a).

American Federation of Labor v. *Swing,* 312 U. S. 321 relied on by the appellants is not in point here. The injunction was granted in the case at bar not because the picket was not a Newberry employee, but because the purpose of the picketing was found to

be unlawful and against the public policy of the State. As we have pointed out above, the facts clearly support the finding of an unlawful purpose.

Even where picketing is "peaceful", if its purpose is unlawfully to coerce either employer or employees, the State Court may enjoin it.

Building Service Employees In'l Union, Local 262 v. *Gazzam,* 339 U. S. 532;
Hughes v. *Superior Court,* 339 U. S. 460;
In'l Brotherhood of Teamsters Union, Local 309 v. *Hanke,* 339 U. S. 470;
Giboney v. *Empire Storage & Ice Co.,* 336 U. S. 490.

As this Court stated in the *Gazzam* case, page 537, "this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity."

CONCLUSION

The motion to dismiss the appeal should be granted and the appeal dismissed.

Respectfully submitted

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IN THE

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v.

J. J. NEWBERRY COMPANY, a corporation, *Appellee*

On Appeal from the Supreme Court of the State of Idaho

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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IN THE

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OCTOBER TERM, 1956

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v.

J. J. NEWBERRY COMPANY, a corporation, *Appellee*

On Appeal from the Supreme Court of the State of Idaho

BRIEF OPPOSING MOTION TO DISMISS APPEAL

This brief is in reply to appellee's motion to dismiss the appeal, and supporting brief. Appellee seeks dismissal on various grounds. However, we desire to limit our reply to certain of appellee's arguments under (a) claim of federal preemption, and (b) question of free speech.

(a) Claim of "Federal Preemption"

Appellee endeavors to demonstrate that the picketing in the instant case is not an unfair labor practice under section 8(b)(1) or 8(b)(2) of the Labor Management Relations Act, and that therefore federal preemption does not lie. Appellee errs in this conclusion as will be shown, but more important, it misconceives the principles of federal preemption as

laid down by this court. Whether or not the Union's conduct constitutes an unfair labor practice is a matter to be determined by the Labor Board in the first instance, particularly where the conduct complained of may be reasonably deemed to come within the purview of the Taft-Hartley Law. If not prohibited activity, it may come within the protection of section 7 of the law. Confusion and mischief would result if the courts were free independently of the Labor Board to pass on the question of unfair labor practice and to by-pass the administrative scheme established in the Labor Management Relations Act. Particularly is there a lack of appreciation in appellee's brief of the proposition that if the conduct complained of is not prohibited, it may well be protected activity under the provisions of the Labor Management Relations Act.

Local No. 25 v. *New York, New Haven, & H. R. Co.*, 76 S. Ct. 227.[1]
Weber v. *Anheuser-Busch Inc.*, 348 U.S. 468.[2]
Garner v. *Teamsters Union*, 346 U.S. 485.[3]

Appellee insists that the allegations in the original complaint relative to the Union's objectives in picketing, be regarded as having no effect. Appellants' reference to such allegations in the original complaint (that the picketing had as its objective the intimidation and coercion of plaintiff's employees to join and become members of the Union), were significant statements of matters within the purview and jurisdiction of the Labor Management Relations Act. While no longer part of the controlling pleadings by

[1] Page 14, Jurisdictional Statement.
[2] Page 13, Jurisdictional Statement.
[3] Pages 15, 16, Jurisdictional Statement.

reason of the amendment, it remains a part of the record. The amendment did not change the nature of the controversy. It had the effect of expanding the alleged objectives of the picketing since an "unlawful contract" covers more aspects reasonably involving unfair labor practices than an allegation of coercion of employees into union membership, standing alone. Indeed, an "unlawful contract" usually encompasses membership in the union as a condition of employment. Reference to the original complaint supports this premise. In any event, the complaint, amended and original, presented a picture of alleged unfair labor practices which in the first instance should have been determined by the National Labor Relations Board. Federal preemption cannot be lost by a mere reshuffling of words.

Even if viewed in terms of the amended complaint only, the Union's conduct in picketing for a contract without any representation and against the wishes of the employees in the Newberry store, raises a serious question of violations of employee rights under sections 7, 8(b)(1), and 8(b)(2) of the Labor Management Relations Act.[4]

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[4] Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of

Appellee seeks to demonstrate that recognition picketing without employee representation is not an unfair labor practice notwithstanding the fact that the findings in this case involve picketing for a contract which encompasses and goes beyond picketing for recognition. A labor contract covers wages, hours, and working conditions and often includes a union shop provision requiring membership in the union. Indeed, the only contract in evidence which was the Union's standard contract in Pocatello, covered these subject matters and provided for a union shop. (Ex. 23, R. 281) This contract was executed by 50 employers in Pocatello. (R. 282) Plainly, therefore, in the posture of this case, picketing for a contract without employee representation entails a denial of employee rights to self-organization, to bargain collectively through representatives of their own choosing, and to refrain from such activities as set forth in section 7 of the Act, and otherwise involves unfair labor practices within the meaning of sections 8(a)(3), 8(b)(1), and 8(b)(2).

The court found that the picketing was for the purpose of coercing Newberry into contracting with

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the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

the Union. Reference to recognition picketing is nowhere found in the court's opinion—it is appellee's own creation. However, even on this limited issue, whether recognition picketing under the circumstances of the case constitutes an unfair labor practice, presents a fair question which must be initially determined by the Board. The record discloses that the Union withdrew its petition for an election following a repudiation of the union by the employees. Picketing even for bare recognition under these circumstances could reasonably be construed as depriving employees of rights under section 7 of the Act and as an unfair labor practice under section 8(b)(1)(A).

The Ninth Circuit Court of Appeals in *Capitol Service, Inc.* v. *National Labor Relations Board*, 204 F. 2d 848, stated,

> The language of 8(b)(1)(A) prohibiting restraint and coercion by a labor organization is the same in this regard as Section 8(a)(1) providing for an EMPLOYER, that (a) "It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Sec. 7 of this title."
>
> The Supreme Court has held of Section 8(a)(1) of the Wagner Act, which is the same as in the Taft-Hartley Act, that the test whether the employer has violated the "restrain" provision is whether "the words or deeds * * * taken in their setting, were reasonably likely to have restrained the employees' choice and [whether] the employer may fairly be said to have been responsible for them * * *" N.L.R.B. v. Link Belt Co., 311 U.S. 584, 599, 61 S. Ct. 358, 85 L. Ed. 368. It is

inconceivable that the Taft-Hartley Act intended the identical words of 8(a)(1) and 8(b)(1) to have a different meaning when applied to a labor organization from that when applied to an employer. The Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act.

Nothing could more strongly restrain Service's employees from retaining their non-union status or coerce them into joining the Bakery Union than stopping or making intermittent their employment by persuading the public to boycott the products of their work.

Appellee cites administrative rulings of the General Counsel, which have been superseded. (Brief of appellee, p. 13.) More recently, the present General Counsel on behalf of the Board authorized and issued complaints of unfair labor practices in which it is alleged that picketing for recognition on the part of a union without majority status constitutes an unfair labor practice. See:

Intl. Union of Operating Engineers, Local Union No. 12, and Shepherd Machinery Co., Case No. 21-CB-805. 39 L.R.R. 38 (Nov. 19, 1956)

Intl. Union of Operating Engineers, Local Union No. 12, and Mrs. Erwin Selvin, Case No. 21-CC-229

Local 639 Teamsters, and Curtis Brothers, Inc., Case No. 5-CB-190. 39 L.R.R. 46 (Nov. 26, 1956)

Ruffalo's Trucking Services, Inc., 2-CC-379 and 384 consolidated with Cases Nos. 2-CB-1720 and 1763. L.R.R. (Nov. 26, 1956) Vol. 39, No. 7, 39 Analysis 16.

In the *Shepherd Machinery Co.* case,[5] Trial Examiner Howard Myers concluded, ". . . the activities and conduct of Local 12, as epitomized above, even though it was in the form of picketing, was illegal restraint and coercion and hence violative of Section 8(b)(1)(A) of the Act." Trial Examiner Myers placed great reliance on this court's ruling in

> *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490
> *Building Service Employees* v. *Gazzam*, 339 U.S. 532

and in that connection stated:

> The Supreme Court of the United States, within recent years, in cases involving facts similar to those now before us, has condemned the unlawful use of economic power by unions to compel employers to violate the law.

The intermediate report made special reference to the *Gazzam* case where the employer had been asked by the union to sign a contract even though none of the employees were members of the union. The court in *Gazzam* stated at page 540,

> . . . Here, as in *Giboney*, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the state. *That state policy guarantees workers free choice of representatives for bargaining purposes. If respondent had complied with petitioners' demands and had signed one of the tendered contracts and lived up to its terms, he would have thereby coerced his*

[5] Trial examiner rulings are not officially reported, but copies are available through the Board offices in Washington, D. C. Digests and comments are found in the *Labor Relations Reporter*. See citations above.

> *employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative.* (Emphasis added.)

Trial Examiner Sidney Lindner concluded in the *Curtis Brothers* case[5] that the union's conduct did not violate the Act, but impliedly held that it was protected activity. The *Ruffalo* case has been heard and is awaiting the trial examiner's report. These matters are now before the Board and can be decided only by the Board in the first instance.

Plainly, the problem of recognition picketing is a matter within the purview of the Board's jurisdiction, and a state court is without power to enjoin such picketing. Newberry in the instant case in no way sought relief from the Board, but instead obtained a state court injunction.

Appellee errs in its analysis of *Garner* and *Weber*. It seeks to limit these decisions to the precise factual situations presented there and as constituting a determination by this court that unfair labor practices occurred in those cases. Appellee ignores and makes no reference to the basic guiding principles relative to federal preemption as enunciated in those cases, particularly the holding in *Garner*.

> . . . It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. (346 U.S. 485).

Nor does appellee demonstrate any recognition of the holding in *Weber* (at page 478):

> We do not mean to pass on the question whether the Board, by finding that no violation of (D) was involved, inferentially ruled that other subsections were or were not violated. *The point is rather that the Board, and not the state court, is empowered to pass upon such issues in the first instance . . . Congress has lodged in the Board responsibility for determining in the first instance whether the same considerations apply to (A) or (B) as apply to (D).* (Emphasis added.)

Appellee draws the distinction between picketing to coerce an employer into compelling employees to join the union—the factual situation in *Garner*—and picketing by a union without representation to force an employer into granting the union a contract as found by the Idaho courts. No difference exists in principle between these situations. Each is designed and has the effect of depriving employees of rights under the Labor Act through pressure on the employer. Indeed, of the two objectives, picketing for a contract covers a broader deprivation of employee rights since so much more is involved in a contract than mere membership in a union.

It is respectfully asserted that appellee's argument relative to federal preemption is without merit.

(b) The Question of Free Speech

As the jurisdictional statement makes clear, the picketing in this case notwithstanding appellee's conjectures, consisted of a peaceful patrol with a truthful sign and no more. Appellee projects its views on the picketing with fanciful objectives, drawing unsupported inferences of its own (Brief of appellee, pages 16, 18). These are in no way supported by the

findings of the court. Concededly the Idaho Supreme Court found that the picketing was for an unlawful purpose, i.e., to compel Newberry to enter into an unlawful contract. This was the sole basis for attributing an unlawful objective to the picketing. But once this purpose is stated, does appellate review end there? Must there not be a rational base to the finding of an unlawful purpose? Can an unsupported finding that the picketing was to obtain a contract be the basis of a finding of unlawful purpose when in fact at no time did the union present to, or discuss with appellee a contract or proposed agreement? Appellants contend that an injunction against picketing under such circumstances violates constitutional rights.

In *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532, the union was given every opportunity to organize the employer's workmen. Four meetings were held by union representatives with the employer, and each time the employer was asked to sign a contract and four times refused. After such a chain of conduct, it was relatively simple for the state court to conclude that the ensuing picketing had as its purpose to compel the employer to coerce his employees. And further, note how this Court narrowly defined the question presented in *Gazzam:* "Does the injunction, limited as it is to restraining petitioners from picketing respondent's hotel for the purpose of compelling him to coerce his employees' choice of bargaining representatives, constitute an abridgment of the right of free speech under the First and Fourteenth Amendments?"

But here the Idaho court specifically found that no contract was presented to appellee, and no action of any kind was taken beyond the advertising picket.

It is in this context that the free speech question assumes its importance. Appellants' reliance on *American Federation of Labor* v. *Swing,* 312 U.S. 321, was more for the broad principle that peaceful picketing cannot be narrowly restricted by a state court rather than any claim that this case was decided on the issue of stranger picketing.

The penetrating aspect of the free speech question here is whether a state court, by artificially attaching a finding of interference with freedom of contract on all forms of organizational or advertising picketing, can outlaw all such picketing. If such be the case, then indeed *Swing* is dead. But appellants insist that their right to advertise the non-union status of appellee, unaccompanied by any coercive conduct, still retains some constitutional vitality. That is the real free speech question in this case, and it is of sufficient substance to warrant this Court's assumption of jurisdiction and reversal of the Idaho Supreme Court.

CONCLUSION

The motion to dismiss the appeal should be denied.

Respectfully submitted,

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No. 597. RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, ET AL. *v.* J. J. NEWBERRY CO. Appeal from the Supreme Court of Idaho. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted. The judgment of the Supreme Court of Idaho is reversed. *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *Garner* v. *Teamsters Union*, 346 U. S. 485.

S. G. Lippman, Joseph E. Finley and *Clarence M. Beck* for appellants. *Lemuel Skidmore* for appellee. Reported below: 78 Idaho —, 298 P. 2d 375.